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No. 95-619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TALAL H. ALZANKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The First Circuit

REPLY FOR PETITIONER

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11 pp

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
I.	THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS REGARDING THE APPLICABILITY OF THE *DAUBERT* STANDARD	1
II.	IN HOLDING THAT THE DISTRICT COURT'S DECISION TO ADMIT EXPERT TESTIMONY WAS REVERSIBLE ONLY FOR ABUSE OF DISCRETION, THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS	3
III.	THE FIRST CIRCUIT'S HOLDING THAT A THREAT OF DEPORTATION TO A FRIENDLY COUNTRY AMOUNTS TO "PHYSICAL OR LEGAL COERCION" WARRANTS REVIEW BY THIS COURT	5
CONCLUSION		7

TABLE OF AUTHORITIES

Cases **Page**

Carroll v. Morgan, 17 F.3d 787 (5th Cir. 1994) 5
Cella v. United States, 998 F.2d 418 (7th Cir. 1993) 4
Cook v. American S.S. Co., 53 F.3d 733 (6th Cir. 1995) 4
Daubert v. Merrell Dow Pharmaceutical, 113 S. Ct. 2786 (1993) 1, 2
Daubert v. Merrell Dow Pharmaceutical, Inc., 43 F.3d 1311 (9th Cir.), *cert. denied*, 116 S.Ct. 89 (1995) 5
Hamling v. United States, 418 U.S. 87 (1974) 4
Mars v. United States, 25 F.3d 1383 (7th Cir. 1994) 4
In Re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3rd Cir. 1994), *cert. denied sub nom. General Elec. Co. v. Ingram*, 115 S. Ct. 1253 (1995) . . . 4
Petruzzis IGA Supermarket, Inc. v. Darling-Delaware Company, 998 F.2d 1224 (3d Cir.), *cert. denied*, 114 S.Ct. 554 (1993) 2
Salem v. United States Lines Co., 370 U.S. 31 (1962) 4
United States v. Anderson, 61 F.3d 1290 (7th Cir.), *cert. denied*, 116 S.Ct. 543 (1995) 4
United States v. Arevalo-Gamboa, No. 94-50236, 1995 U.S. App. LEXIS 31275 (9th Cir. Oct. 24, 1995) 1
United States v. Kozminski, 487 U.S. 931 (1988) 5
United States v. Nobles, 422 U.S. 225 (1975) 3, 4
United States v. Powers, 59 F.3d 1460 (4th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3485 (U.S. Jan. 16, 1996) (No. 95-6391) 4
United States v. Rice, 52 F.3d 843 (10th Cir. 1995) 5
United States v. Sepulveda, 15 F.3d 1161 (1st Cir 1993), *cert. denied*, 114 S.Ct. 2714 (1994) 3
United States v. Shackney, 333 F.2d 475 (2d Cir. 1964) 5, 6
United States v. Sinclair, No. 94-3716, 1996 U.S. App. LEXIS 306 (7th Cir. Jan. 10, 1996) 1

TABLE OF AUTHORITIES (Cont'd)

Page

United States v. Thomas, No. 95-1102, 1996 U.S. App. LEXIS 422 (6th Cir. Jan. 16, 1996) 1, 4
United States v. Velasquez, 64 F.3d 844 (3rd Cir. 1995) . . . 1
Watkins v. Schriver, 52 F.3d 769 (8th Cir. 1995) 5

Statutes

18 U.S.C. § 1584 5

REPLY

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS REGARDING THE APPLICABILITY OF THE *DAUBERT* STANDARD.

In its opposition, the government does not dispute that there is a split among the circuits about whether the reliability standard for the admissibility of scientific evidence established in *Daubert v. Merrell Dow Pharmaceutical*, 113 S.Ct. 2786 (1993), also applies to other expert testimony, including that characterized as "specialized" knowledge. Decisions of the Third, Sixth, Seventh and Ninth Circuits rendered after the filing of the Petition continue to evidence a growing split among the circuits on this issue.[1] The government makes no attempt to suggest that the prompt resolution of this conflict is not important, and indeed, could not do so.

Instead, the government contends that this case does not present that issue. The government asserts that the Court of Appeals "did not hold that the criteria for the admission of expert testimony articulated in *Daubert* are inapplicable to psychological or non-scientific expert testimony" (Opp. 6), and that, as evidence of this, the First Circuit had even "cited" *Daubert*. The government's reading of the First Circuit opinion is untenable, and confuses the relevance inquiry required by *Daubert* with the separate reliability inquiry that *Daubert* mandates. *Daubert* requires that a trial judge determine both whether the evidence is *relevant* (*i.e.*, whether it will assist the trier of fact) and whether

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[1] *See United States v. Thomas*, No. 95-1102, 1996 U.S. App. LEXIS 422, *12 (6th Cir. Jan. 16, 1996) (holding that the relevance and reliability standards in *Daubert* apply to "all expert testimony offered under rule 702."); *United States v. Sinclair*, No. 94-3715, 1996 U.S. App. LEXIS 306, *9 (7th Cir. Oct. 24, 1996) (holding *Daubert* applies only to scientific expertise); *United States v. Arevalo-Gamboa*, No. 94-50236, 1995 U.S. App. LEXIS 31275, *7 (9th Cir. 1995) (same); *United States v. Velasquez*, 64 F.3d 844, 850 (3rd Cir. 1995) (acknowledging confusion among the courts and applying *Daubert* to specialized knowledge).

it is *reliable*.[2] There is nothing to suggest that either the trial judge or the Court of Appeals here applied *Daubert*'s reliability analysis to the "victimologist" testimony offered as expert evidence in this case.

Although Petitioner urged that *Daubert* required a reliability inquiry,[3] the First Circuit never examined the various factors suggested in *Daubert* to test the reliability of expert testimony. No review was made of the "victimologist's" underlying reasoning, her methodology, the error rate in her field, whether her theories and conclusions were subject to peer review, or whether her theories and conclusions were gen-erally accepted in the psychological community. The opinion makes it clear that the First Circuit upheld the admission of the testimony solely on the basis of whether the evidence would assist the trier of fact, *i.e.*, whether it was relevant. *See* Pet. 16a (Court of Appeals stated that the "*ultimate* standard for admission" was whether the "'specialized knowledge' possessed by the witness [would] '*assist* the trier of fact'").

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[2] 113 S.Ct. at 2796. To determine whether expert evidence is reliable, the Court in *Daubert* suggested four factors which could be considered: (1) whether the theory or technique can or has been tested; (2) whether the theory or technique has been subjected to peer review; (3) what the known or potential error rate is for the technique or theory; and (4) whether it has been generally accepted in the expert's community. 113 S.Ct. at 2796-97.

[3] Contrary to the government's suggestion (Opp. 7), Petitioner directly raised the issue of *Daubert*'s reliability requirement at the appellate level. Citing *Petruzzi's IGA Supermarket, Inc. v. Darling-Delaware Company*, 998 F.2d 1224, 1238 (3d Cir.), *cert. denied*, 114 S.Ct. 554 (1993) and *Daubert*, 113 S.Ct. at 2795-2699, Petitioner argued on appeal that the "victimologist's" testimony must be *reliable*, and her theories generally accepted in her particular field, for it to be admissible. (App. Br. 20). Petitioner also raised specific issues of reliability, such as Ms. Burgess' admission that she had never participated in any study in the field of involuntary confinement, thereby challenging the basis for her opinions and conclusions. (App. Br. 21).

The government's assertion that the First Circuit "cited" *Daubert* (Opp. 6) is both inaccurate and irrelevant. The First Circuit cited to *United States v. Sepulveda*, 15 F.3d 1161 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 2714 (1994), which cited *Daubert* for the proposition that the trial judge must examine relevance, *i.e.*, perform a "gatekeeping function" requiring assessment of "whether it is '*reasonably likely* [ ] that the expert possesses specialized knowledge which will assist the trier better to understand a fact in issue." (Pet. 16a). That is the only reference in the First Circuit's opinion to *Daubert*. Indeed, the Court below cited no case involving scientific evidence or the test of reliability under *Daubert*, nor did it even *refer* to reliability.

Finally, the government, relying on *United States v. Nobles*, 422 U.S. 225, 241-2 n.16 (1975), claims that the "fact-bound application of rule 702 to the circumstances of this case does not warrant review by this Court." (Opp. 8). But this case warrants this Court's review precisely because the First Circuit did not render a fact-bound decision but instead declined to apply the proper standard. The First Circuit did not address the reliability question at all. The courts of appeal are in conflict as to whether the proper application of Rule 702 to non-scientific experts requires the application of this Court's reliability standards in *Daubert*.

II. IN HOLDING THAT THE DISTRICT COURT'S DECISION TO ADMIT EXPERT TESTIMONY WAS REVERSIBLE ONLY FOR ABUSE OF DISCRETION, THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

With respect to the second issue presented, the government apparently agrees that the First Circuit applied an abuse of discretion standard of review in this case, but argues that such a standard of review is the appropriate one for cases involving the admission of expert testimony, and that there is no conflict among the circuits about the proper standard.

Again the government confuses the question of reliability with the question of relevancy.[4] To be sure, the courts of appeals generally review relevancy determinations under an abuse of discretion standard. But the courts of appeals are divided on the question whether reliability determinations are reviewable under that same standard or under a stricter standard of review.

The Sixth Circuit quite clearly holds that reliability determinations under *Daubert* are to be reviewed *de novo*. *Cook v. American S.S. Co.*, 53 F.3d 733, 738 (6th Cir. 1995); *United States v. Thomas*, No. 95-1102 1996 U.S. App. LEXIS 422, *15 (6th Cir. Jan. 16, 1996). One Seventh Circuit opinion has held that "we will review *de novo* the reliability of the scientific facts, data, and techniques utilized by [the expert] in deriving his opinion," *Cella v. United States*, 998 F.2d 418, 423 (7th Cir. 1993), while a subsequent one has limited the use of that standard only to determinations regarding "the reliability of an entire *class* of scientific evidence"[5] — as opposed to those for individual experts. *See Mars v. United States*, 25 F.3d 1383, 1384 (7th Cir. 1994) (criticizing *Cella*).

The Third Circuit also rejects a traditional abuse of discretion standard of review, instead applying a heightened abuse of discretion standard or "hard look" to expert determinations in certain circumstances. *In Re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 749-50 (3rd Cir. 1994) (expert testimony issues do not require the same deference upon review as do other evidentiary

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[4] Many of the cases cited by the government for the proposition that the appropriate standard of review in this case was for abuse of discretion (Opp. 8-10) do not involve reliability determinations. *See United States v. Nobles*, 422 U.S. 225, 241-242 n.16 (1975); *Hamling v. United States*, 418 U.S. 87, 108 (1974); *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962); *United States v. Anderson*, 61 F.3d 1290, 1297 (7th Cir.), *cert. denied*, 116 S.Ct. 543 (1995).

[5] This case, of course, presents that type of class question: whether or not expert psychological testimony, such as that of the "victimologist" in this case, is sufficiently reliable to qualify under *Daubert*.

issues, because "evaluating the reliability of scientific methodologies and data does not generally involve assessing the *truthfulness* of the expert witnesses and thus is often not significantly more difficult on a cold record"), *cert. denied sub nom. General Elec. Co. v. Ingram*, 115 S.Ct. 1253 (1995).

Finally, the remaining circuits typically apply an abuse of discretion standard of review to determinations of reliability, as the First Circuit did in this case. *E.g., United States v. Powers*, 59 F.3d 1460, 1471 (4th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3485 (U.S. Jan. 16, 1996) (No. 95-6391); *Carroll v. Morgan*, 17 F.3d 787, 789 (5th Cir. 1994); *Watkins v. Schriver*, 52 F.3d 769, 771 (8th Cir. 1995); *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 43 F.3d 1311, 1315 (9th Cir.), *cert. denied*, 116 S.Ct. 189 (1995)[6]; *United States v. Rice*, 52 F.3d 843, 847 (10th Cir. 1995).

III. THE FIRST CIRCUIT'S HOLDING THAT A THREAT OF DEPORTATION TO A FRIENDLY COUNTRY AMOUNTS TO "PHYSICAL OR LEGAL COERCION" WARRANTS REVIEW BY THIS COURT.

The Petition also urged that the First Circuit's holding below that a threat of deportation to a friendly country could amount to the compulsion required to violate 18 U.S.C. § 1584 under *United States v. Kozminski*, 487 U.S. 931 (1988), was directly in conflict with the holding of the Second Circuit in *United States v. Shackney*, 333 F.2d 475, 487 (2d Cir. 1964). The government contends that the First Circuit did not base its holding on Petitioner's threat to have Gedara deported. (Opp. 10). The opinion makes clear, however, that the threat of deportation was indeed the linchpin of the court's ruling. Although the First Circuit acknowledged other alleged facts such as lack of nourishment and some instances of physical abuse (Pet. 12a-13a),

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[6] The government points out that the Petition incorrectly listed the Ninth Circuit as rejecting an abuse of discretion standard for reliability determinations. (*See* Opp. 9.)

the court failed to find in them the "requisite 'compulsion,'" which requires more than "exceedingly bad" circumstances. (Pet. 13a). The court upheld Petitioner's conviction solely because it found that the jury could have reasonably believed that the "victim" viewed deportation to be "at least as severe as imprisonment, particularly when viewed in light of her 'special vulnerabilities.'" (Pet. 14a (footnote omitted); *see id.* at 15a.)[7]

Contrary to the government's contention, *Shackney* is not distinguishable simply because the victims there were to be deported to Mexico, the country from which they came. The government contends that the threats of deportation in this case were far worse than in *Shackney* because the "victim" here would have been sent back to Kuwait, which the government claims "was not her country of origin," and would have been prevented from "returning to her family in Sri Lanka." (Opp. 11). This ignores the fact that the victim's "country of origin" for her entry into the United States — *i.e.*, the country from which she came — was Kuwait, not Sri Lanka. (Pet. 1a-2a). Moreover, the record demonstrates that she was able to travel freely between Kuwait and Sri Lanka, having at least twice voluntarily left Sri Lanka for work in Kuwait, and having returned to Sri Lanka in between to escape the Gulf War (Tr. 4-57 to 4-61).

Despite the government's efforts to rewrite the First Circuit opinion, this case presents a clear conflict with *Shackney* as to whether and in what circumstances the threat of deportation alone can satisfy the compulsion requirement of *Kozminski*. This case has also vividly demonstrated that this Court's opinion in *Kozminski* offers little guidance to either defendants or courts

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[7] Contrary to the government's characterization, even the "other threats and warnings" cited by the Court of Appeals (Pet. 14a n.10; *see* Opp. 10) were only relevant to the extent that they "provided further support" for the conclusion that "a threat of deportation in these circumstances plausibly may equate with imprisonment" (*see* Pet. 14a n.10).

regarding the proper standard for a conviction for involuntary servitude.[8]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[8] The government in its Opposition fails to address the confusion caused by *Kozminski*, presumably because there is little to say other than that the opinion — and thus, the statute in question — requires substantial and immediate clarification.